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No. 572.

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SOLOMON HOTEMA, PLAINTIFF IN ERROR,
v.
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ARGUMENT FOR APPELLEE.

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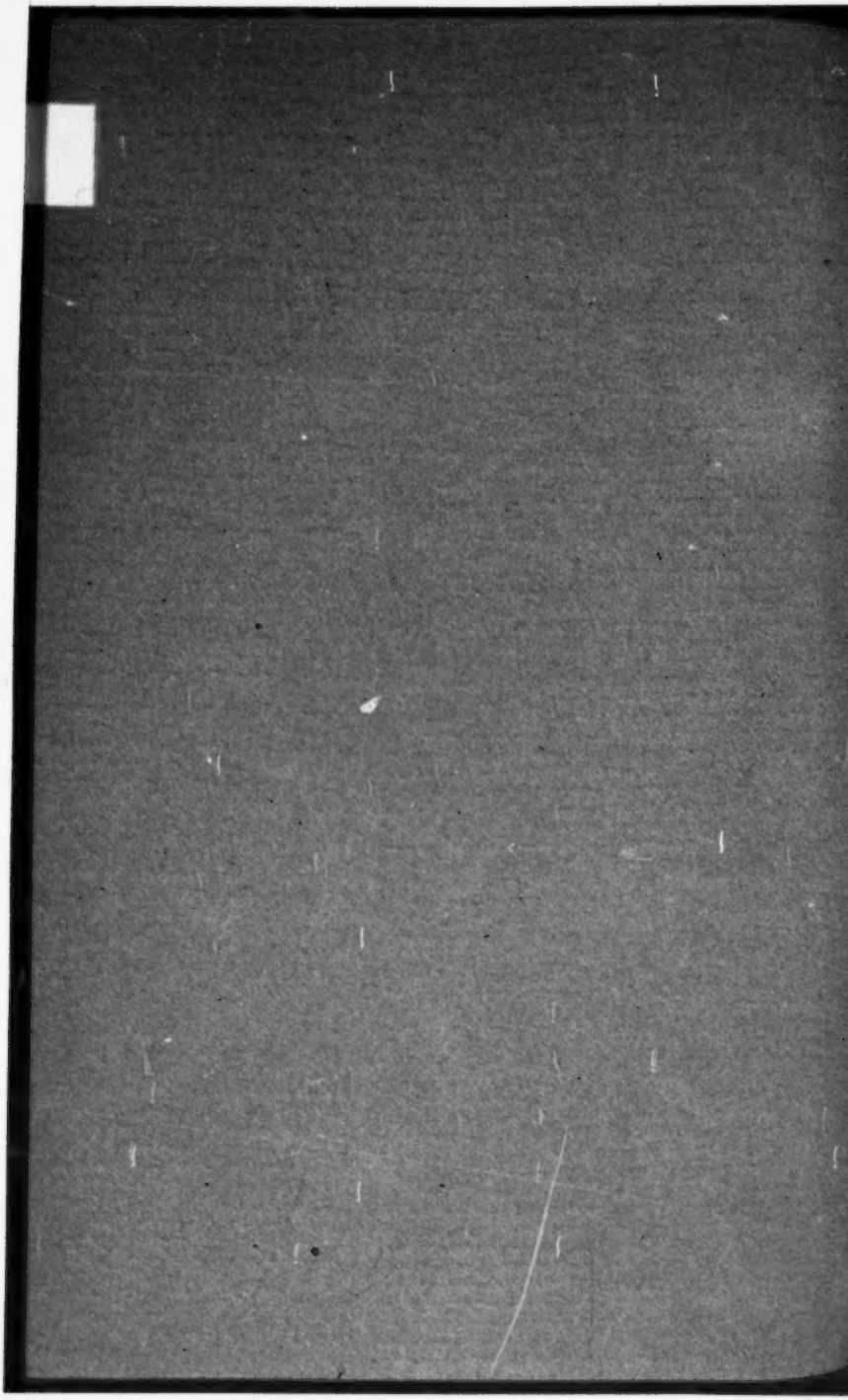

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ARGUMENT FOR APPELLEE.

The appellant, Solomon Hotema, was convicted of the murder of one Vina Coleman in the Indian Territory, and was duly sentenced to be hung. The fact of the murder was not disputed, and was exceptionally atrocious in character, assuming that the defendant was mentally responsible for his acts. Hotema was a Choctaw Indian, about 50 years of age. He had become a leader of his people, and had been a school teacher, a minister of the gospel, a lawyer, and a judge. The testimony showed that he was ordinarily of a peaceable temperament, and was generally respected, but for several years previous to the murder he occasionally drank to excess, and during these periods of intoxication he was apt to become offensively demonstrative in his conduct. The testimony further showed that Hotema seemed to share some belief in the existence of witches. On the day before

the murder Hotema attended a session of the local Presbyterian Church and that evening sent to the neighboring town of Grant for several quarts of whisky. Early on the following morning, namely, April 14, 1899, Hotema went to the house of Vina Coleman, who was a connection of his by marriage, and went up to her and raised his gun and fired three shots at her, the last of which was fatal. He then returned to his home, and several hours later he was seen in company with two other Choctaw Indians. They rode to the house of one Amos Morris, who was several miles distant, and killed him, and later in the day he killed another Indian woman. There was some proof that he had been drinking to excess on the day before the three murders. The defendant did not dispute the fact of the killing, but made a defense on the ground of delusional insanity, contending that Hotema at the time of the commission of the murders was laboring under the insane delusion that the people whom he murdered were witches. Upon this point the testimony was conflicting. Expert and nonexpert witnesses testified for and against the theory of insanity, and the jury by its verdict of guilty found that he was sane.

He was indicted in the court of the Indian Territory, but the case was removed to the United States district court for the eastern district of Texas, where the trial was had and the conviction sustained.

With this brief sta'ement of facts I pass to such of the assignments of error as seem to justify discussion.

(1) The first assignment of error is because of the

court in sustaining the demurrer of the United States to the defendant's plea of former jeopardy.

The defendant was tried on an indictment which charged "that one Solomon Hotema, on the 14th day of April, A. D. 1899, within the central district of the Indian Territory aforesaid, with force and arms, in and upon the body of one Vina Coleman then and there being, feloniously, willfully, and of his malice aforethought did make an assault," etc.

To this indictment he pleaded "not guilty," and also filed a special plea, which is as follows:

> Now comes the defendant, Solomon Hotema, and for special plea herein says, on oath, that there were three indictments filed in this court charging him with the crime of murder of different persons; that two of the cases, viz, Nos. 2024 and 2025, were consolidated and tried in this court, and on the —— day of April, 1901, the jury returned a verdict of not guilty, which was received by the court, and the jury discharged. Affiant further shows that the only defense he or his counsel offered on the trial of said case was a plea of insanity. Defendant, on the trial of said case, admitted the killing charged in all three of said indictments, and as a defense affirmed that at the time of the killing he was suffering from such a diseased condition of the brain as that he did not have the mental capacity to commit murder. The only issue made in the case was whether affiant was sane or insane at the time he killed the three persons. The jury found the defendant not guilty on said issue. Affiant alleges further that each and

every fact that he now remembers of that would be admissible on the trial of this cause was offered on the trial aforesaid—at least, proof was offered on every issue that can arise in this case; that the witnesses who testified in the other cases are witnesses in this case, and will swear to same as in the case tried; that these three persons are charged to have been killed on the same day; that on said trial every circumstance connected with the killing charged in this case was proved on the other trial. Affiant says, by reason of the facts herein stated, he has been once in jeopardy upon the same identical case and issue now to be tried; that a jury in this case under affiant's plea of insanity will be compelled to make their verdict upon the same evidence and the same issue the jury found the defendant not guilty on in cases Nos. 2024 and 2025, tried in this court and verdict rendered on —— day of April, 1901. Wherefore defendant pleads former jeopardy, and says this court can not again arraign and try defendant upon said issue without depriving defendant of his constitutional rights.

To this plea the United States attorney demurred, and the court sustained the demurrer.

It is difficult to see how the court could have taken any other action, for the plea itself affirmatively suggested the fact that the two preceding indictments, upon which he had been found not guilty, and which were now pleaded in bar of the third indictment, were for the murder of different persons than that charged in the pending indictment. In other words, the defendant, who was indicted for the murder of C,

pleaded that he had already been acquitted of the murder of A and B on the same day. The plea thus showed that the acquittal of which he plead former jeopardy was for different offenses than that which was the subject of the indictment, and it was, therefore, bad.

The constitutional provision relating to former jeopardy only refers to prosecutions for the same offense and for the same identical act and crime. (*United States* v. *Randenbush*, 8 Peters, 288; Bishop on Criminal Law (6 ed., vol. 1, sec. 1049.)

(2) The second assignment of error is not set forth in the bill of exceptions, and, as the record of the trial is not before this court, it is impossible to determine whether the court did refuse to permit the testimony as stated.

(3) The third assignment of error is to the refusal of the court to permit defendant's counsel to open and conclude the argument.

It appears that, after all the evidence was offered, defendant's counsel moved the court to allow him to open and conclude the argument, because the only issue before the jury was the condition of the defendant's mind at the time of the homicide. A reference to the charge, however, will show that the burden of proving every element of the crime, including mental responsibility, was put upon the plaintiff. Thus, the court said:

> I charge you that the burden is upon the Government throughout the entire case to prove every essential element of the case

> charged, and if you should have a reasonable doubt, taking into consideration all the evidence in this case, that the defendant, Hotema, was sane at the time of the commission of the act charged, you will acquit him.

The court further charged that if the jury had a reasonable doubt with respect to the mental responsibility of the defendant, he was entitled to an acquittal.

Again, the court said:

> If the evidence as a whole fails to show, beyond a reasonable doubt, that Hotema was of sound brain, or at least to that extent that he knew right from wrong, and was capable of forming and carrying into execution a criminal intent, he would be entitled to be acquitted, no matter what amount of whisky he had drunk.

The Government, therefore, having the burden of proving the defendant's sanity beyond a reasonable doubt, was entitled, under the rules of practice, to open and close the case. (*Davis* v. *United States*, 160 U. S., 469, 485.)

At all events, it was a matter clearly in the discretion of the trial judge.

(4) The fourth assignment of error refers to an illustration which the court employed in defining express malice, an illustration which has been used by judges in such cases from time immemorial. It is clear that the court was simply explaining the term "express malice" by an apt illustration, and the criticism that there was no evidence in the case of facts within the illustration is, to say the least, hypercritical.

(5) Counsel for appellant, in his fifth assignment of error, in his professional zeal, inadvertently falls into the error of being unfair to the trial judge. He tears a single sentence from its context and unintentionally perverts its meaning. I quote what the court said, italicising the single sentence which is made the subject of exception, in order that it may be seen how unfair to the trial judge this assignment of error is:

> By the term "implied malice" is meant that in the case charged the evidence shows that the party charged committed the act, and that it was intentional and unlawful; that is, without justifiable excuse, and the evidence fails to reveal the motive why the person committed the act. In that state of case the law attaches or implies malice to the nature of the act done; that is, the taking of human life without justifiable excuse. Where the evidence fails to show that it was done upon express malice, yet it shows that the party charged intentionally did the act without lawful excuse, malice is inferred, although the evidence may not disclose any motive whatever, and, therefore, if the killing was intentional and without justifiable excuse, although no motive is shown for it, the party would be guilty of murder and should be convicted therefor, unless excused upon the ground of insanity or the want of mental capacity to form a criminal intent. *Therefore, in this case it is not material, so far as the question of guilt or innocence is concerned, that the evidence fails to show any motive for the killing*, because if the killing was intentional and was not justifiable

> the law implies the criminal intent, and, unless rebutted by testimony, would justify a conviction, provided the evidence shows that the party charged had sufficient mental ability to be held responsible for his acts.

As the defendant did not deny that he committed the crime, the question of motive as bearing upon the question of whether he did commit it was wholly unimportant. The court did not mean to suggest, and did not suggest, that the alleged absence of motive was unimportant on the question of mental responsibility. The last sentence of the instruction clearly excludes such a suggestion.

(6) The sixth assignment is a clear case of splitting hairs, and is only justified by the fact that the learned counsel is arguing for the life of a possibly friendless Indian. The court clearly instructed the jury as to their right to add to their verdict of guilty, if they found one, the words "without capital punishment." Indeed, having said so in the portion of the charge which is made the subject of exception, the court repeated the admonition to the jury that they could add the words "without capital punishment" in the last words which he addressed to them. Whether technically the jury "assess" punishment, is wholly unimportant. It is at best a verbal quibble; and whether the jury can be said to "assess" the punishment or not, the defendant suffered no prejudice in this respect. (*Carlon* v. *People of Utah*, 130 U. S. 83; *Fitzpatrick* v. *United States*, 178 U. S., 304.)

(7) The sixth assignment is to certain language of the court in instructing the jury on the subject of mental irresponsibility. The appellant complains that the hypothesis of "impulsive insanity" was submitted to the jury rather than "delusionary insanity." Conceding for the moment that there is any practical distinction between the two, yet it was the duty of the court, in justice to the defendant, to submit every phase of the difficult question of insanity to the jury. Had he limited his instruction to a form of delusionary insanity which is not beyond the control of its victim, he would have done injustice to the defendant. The whole charge fairly shows that in his scrupulous regard for the defendant's rights the court submitted every possible theory of insanity which the evidence could justify, and the charge can not be erroneous because it is too full. Certainly the instruction did the defendant no prejudice.

(8) The eighth assignment of error is again based upon a verbal quibble. The court had submitted to the jury the question whether the "defendant's brain was in a diseased and insane state to such a degree that for the time being it overwhelmed his reason, conscience, and judgment, etc."

It is complained that the word "brain" was used instead of the word "mind." Apart from the fact that the words are popularly used synonymously, as no human knowledge has yet discovered what the mind of man is, except the fact that it exists, and all we know of it is that in some mysterious way it has its central seat

in the physical structure known as the brain, it is obvious that in popular meaning the words "brain" and "mind" can be used interchangeably, and that such use could have done the defendant no harm.

(9) That which has been said with reference to the two preceding assignments of error can be repeated as to the ninth assignment of error, where again the question is made between the "brain" and "mind," and between "impulsive" and "delusionary" insanity.

I simply refer, in this connection, to the court's charge as a whole, which certainly did the defendant no injustice. If it erred, it erred against the Government.

(10) The tenth assignment of error, and the reasons set forth as to its justification, are, I frankly confess, beyond my comprehension.

Whether the court accurately quoted the witness can not be determined in the absence of the testimony, but the suggestion that it is error for the court to call the attention of the jury to criminating evidence is to me incomprehensible.

(11) Similarly obscure are the reasons suggested against the excerpt matter which is set forth in the eleventh assignment of error.

The meaning of the instruction, especially when read in connection with its context, and with the whole opinion, clearly is that if Hotema was sane the mere fact that he had formed an erroneous conclusion as to the existence of witchcraft, or that at the time of the murder such erroneous conclusion was in part induced by excessive drinking, would not excuse him

if "at the time he knew it was a violation of human laws and he would be punished."

(12) In the portion of the charge which is quoted in the twelfth assignment of error the court again expresses the same thought, that if Hotema was "not laboring under an insane delusion," but under an erroneous belief that under the teachings of the Bible he had a right to kill a witch, that in such event he was not insane within the meaning of the law. This is correct, especially in connection with the other portion of the charge stated, as it is based on the assumption which runs through the judge's charge that an erroneous belief will not excuse a man from a criminal act, provided he has sufficient mental capacity to know that he is violating the laws of his country. This, I submit, is a correct exposition of the law. Men can not plead immunity from their criminal acts by reason of their erroneous beliefs, assuming, of course, that they are sane. All sane men have some erroneous beliefs, and all insane men have some correct beliefs. The test of responsibility is not accuracy of observation—else insane asylums would have to be unendingly multiplied—but capacity to reason and act according to that normal standard of thinking which we call rationality. An anarchist may have an erroneous belief, in good faith, that governments are an unjust interference with individual liberty, and that the welfare of man would be promoted by the removal of all rulers, but such erroneous belief will not excuse him if he murders a ruler, provided he had sufficient

mental capacity to know that he was violating the law. Indeed, there are erroneous beliefs so abnormal as to amount to insane delusions that do not necessarily give their victims absolute immunity from punishment. All modern authorities on alienism or on insanity are constantly enlarging their ideas as to the responsibility of the insane. As was said by the House of Lords in McNaughten's case, "Notwithstanding a party commits a wrong act while laboring under the idea that he was redressing a supposed grievance or injury, or under the impression of obtaining some public or private benefit, he is liable to punishment. The jury ought in all such cases to be told that every man should be considered of sane mind until the contrary is proved by the evidence; that before a plea of insanity should be allowed undoubted evidence ought to be adduced that the accused was of diseased mind, and that at the time he committed the act he was not conscious of right or wrong. * * * If that be not satisfactorily proved, he is liable to punishment."

Similarly, in the present case, Hotema may have been a man of weak mind, and may have cherished an honest delusion that witches did exist, and that his tribe would be better off if they were killed, and that it was his moral duty under the teachings of the Bible to kill the witches, but if he had sufficient mental capacity to know that it was a violation of law to kill the alleged witches, and if he had sufficient self-control to refrain from the commission of criminal acts, it is

questionable whether even an insane delusion as to the existence of these witches can excuse him from the penalty of his crime.

The judge's charge, as a whole, was more moderate and was at all times predicated upon the existence of insanity, leaving the erroneous belief to be considered with all other testimony in the case in determining the fact of this insanity. This is clearly shown by the portion of the charge referred to in the twelfth assignment of error, which, in effect, said that if Hotema was laboring "under an insane delusion" and not under an erroneous belief, he should be acquitted.

(13) The thirteenth assignment of error requires no attention; and as to the fourteenth assignment of error, it is enough to say that the instructions requested were already sufficiently covered by the general charge.

Under all the circumstances this verdict should be sustained. It may be a proper question hereafter for the pardoning power whether under all the evidence in the case there is such reasonable doubt of the defendant's sanity as to justify some form of Executive clemency, but as the testimony in the case is not before the court, and as such a question would not be reviewable in this tribunal, I submit that no other course is open on this record except to affirm the judgment of the court below.

Respectfully,

JAMES M. BECK,
Assistant Attorney-General.

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